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No. ~~OFFICE OF THE CLERK~~

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

James E. Purkett, Superintendent
Farmington Correctional Center ..... *Petitioner*
v.
Jimmy Elem ..... *Respondent.*

PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX

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18 pp

INDEX OF APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 93-1793

Jimmy Elem,

Appellant,

v.

James Purkett,

Appellee.

* Appeal from the United States District Court for Eastern District of Missouri

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Submitted: November 10, 1993
Filed: June 1, 1994

Before McMILLIAN, Circuit Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

McMILLIAN, Circuit Judge.

In this habeas action brought pursuant to 28 U.S.C. § 2254, petitioner Jimmy Elem appeals from a final order entered in the United States District Court for the Eastern District of Missouri denying his petition for a writ of habeas

corpus. For reversal, petitioner argues that the district court erred in holding: (1) he failed to prove either cause and prejudice or a fundamental miscarriage of justice to overcome his procedural default of all but two of his claims; (2) he failed on the merits of his equal protection claim under Batson v. Kentucky, 476 U.S. 79 (1986) (Batson); and (3) he failed on the merits of his due process claim. For the reasons discussed below, we affirm in part and reverse in part and remand the matter to the district court with directions.

In July of 1986, petitioner was convicted of second degree robbery following a jury trial in Missouri state court. The underlying offense involved an assault and robbery of an African-American woman who identified her assailant as an African-American man with "french-braided" hair and wearing a gray sweatsuit. Petitioner, who fit the description of the robber, was apprehended near the scene of the robbery. The victim identified him as her assailant. During jury selection, petitioner objected to the prosecutor's use of peremptory challenges to strike two African-American men from the jury panel. The prosecutor indicated that his reasons for the strikes were, in part, based upon the jurors' appearance. The state trial court overruled the objection. At trial, a gray sweatsuit was admitted into evidence. The victim identified the sweatsuit as the one worn by the robber.[1]

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[1]At the time petitioner was apprehended by the police, he was wearing cut-off blue jeans and a T-shirt, and the

During deliberations, the jury inadvertently discovered what appeared to be a marijuana cigarette, or "joint," in the sweatsuit. Petitioner moved for a mistrial on grounds that the "joint" was evidence of a crime for which petitioner had not been charged. The trial court denied the motion. After the jury returned a verdict of guilty, petitioner moved for a new trial on the same grounds. The state trial court heard testimony of the jury foreperson, who stated that the jury placed no emphasis on the "joint" in its deliberations. The trial court denied petitioner's motion for a new trial.

Petitioner was sentenced as a persistent offender and received a twenty-five year sentence. He appealed his conviction asserting two grounds: (1) the prosecutor's use of peremptory challenges to strike two African-American jurors violated Batson; and (2) the jury's inadvertent discovery of the apparent "joint" in the gray sweatsuit violated his due process rights. The Missouri Court of Appeals affirmed his conviction. State v. Elem, 747 S.W.2d 772 (Mo. Ct. App. 1988). Petitioner did not bring a state court action seeking post-conviction relief. He next filed a petition for writ of habeas corpus pro se in federal district court. The matter was referred to a United States magistrate judge, who recommended that the petition be denied without a hearing. Elem v. Purkett, No. 4:92CV1927 (E.D. Mo. Jan. 19, 1993) (report and recommendation). The district court adopted the

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sweatsuit was found underneath a nearby parked car.

magistrate judge's report and recommendation and denied the petition. Id. (Feb. 18, 1993) (order). This appeal followed.

Procedural default

Petitioner first argues on appeal that the district court erred in holding that he is not entitled to habeas review of claims which he failed to raise on direct appeal. Of the ten claims asserted by petitioner, the district court declined to consider eight on grounds of procedural default not excused by cause and prejudice or amounting to a fundamental miscarriage of justice.[2] Petitioner now contends that his

[2]Petitioner claims: (1) he received no Miranda warnings; (2) there was insufficient evidence to convict him and that the trial court erred in admitting certain items of physical evidence; (3) he was convicted through use of "incredibly bad police work"; (4) the state trial court abused its discretion by considering "hearsay testimony" of the jury foreperson concerning the basis for the conviction; (5) the prosecutor introduced evidence concerning two "unknown and/or alleged" witnesses, thereby depriving petitioner of the right to confront his accusers; (6) the prosecutor engaged in improper and prejudicial argument; (7) defense counsel was incompetent; and (8) the original information charging him with robbery in the second degree was fatally defective for failing to indicate he stole over $150.00. Slip op. at 2-3.

procedural default should be excused on grounds that a fundamental miscarriage of justice will result if his claims are not considered on their merits. Sawyer v. Whitley, 112 S. Ct. 2514 (1992) (applying fundamental miscarriage of justice standard to penalty phase of capital murder case). In Sawyer v. Whitley, the Supreme Court considered whether the petitioner was eligible for habeas review of his death sentence under the fundamental miscarriage of justice doctrine, despite the procedural default of his constitutional claims. The Court explained, in that context, that "to show 'actual innocence' one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." Id. at 2517. Having reviewed the petition in the present case, the district court held that petitioner "has not shown any facts to warrant concern about a fundamental miscarriage of justice." Slip op. at 4. Upon careful review, we agree. None of petitioner's procedurally defaulted claims, even if proven, would establish by clear and convincing evidence that petitioner is "actually innocent" of the offense such that no reasonable juror would have found him guilty. Accordingly, we affirm this aspect of the district court's order.[3]

[3]We recognize that some of petitioner's defaulted claims are moot in light of our reversal on Batson grounds. However, because some may be reasserted if petitioner is retried, we address the procedural default issue.

Batson violation

Petitioner next argues that the district court erred in holding that his equal protection rights under Batson were not violated as a result of the prosecutor's use of peremptory challenges to strike two African-American jurors from the jury panel. Petitioner challenges the legitimacy of the prosecutor's explanation for striking jurors 22 and 24.[4] The prosecutor stated that he struck juror 22 because that juror had long curly hair, a mustache and a goatee-type beard. He also noted that juror 24 had a mustache and a goatee-type beard. Apparently they were the only two with facial hair on the panel. The prosecutor stated "I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me." He then further noted that juror 24 had been a witness in a supermarket robbery and had a sawed-off shotgun pointed at his face. The prosecutor stated "I didn't want him on the jury as this case does not involve a shotgun, and maybe he would feel to have a robbery you have to have a gun, and there is no gun in this case." Trial Transcript at 61.

In Batson, the Supreme Court held that purposeful racial discrimination in the jury selection process violates a criminal defendant's constitutional rights. "The Equal

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[4]The prosecutor did not exercise a peremptory challenge to strike juror 16, an African-American woman.

Protection Clause guarantees the defendant that the State will not exclude members of his [or her] race from the jury venire on account of race, . . . or on the false assumption that members of his [or her] race as a group are not qualified to serve as jurors." 476 U.S. at 86 (citations omitted). Batson requires the criminal defendant to establish a prima facie case of racial discrimination in the jury selection process by showing: (1) he or she is a member of a cognizable racial group; (2) the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire panel; and (3) these facts and any other relevant circumstances raise an inference that the prosecutor purposefully excluded the venire persons from the petit jury because of their race. Id. at 96. Once the defendant makes a prima facie showing, the burden shifts to the prosecution to come forward with a neutral explanation for the peremptory strikes. On that point, the Court further explained that blacks may not be excluded on the assumption that they, as a group, are not qualified to serve as jurors, or that they will be biased simply because the defendant is black. Id. at 97. Notably, "the prosecutor must give a 'clear and reasonably specific' explanation of his [or her] 'legitimate reasons' for exercising the challenges." Id. at 98 n.20 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)) (emphasis added). Finally, the trial court must ultimately decide whether the defendant has established purposeful discrimination. Batson, 476 U.S. at 98. As a practical matter, "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court

has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." Hernandez v. New York, 111 S. Ct. 1859, 1866 (1991) (Hernandez). At that point, the only question is whether the prosecution exercised its peremptory challenge with a racial animus. The trial court's ultimate finding on this issue is to be set aside only if clearly erroneous. Id. at 1871.

Our review in the present case focuses on whether the state trial court clearly erred in its ultimate determination that the prosecution's actions were not racially motivated with respect to jurors 22 and 24. We are mindful of the presumption of correctness that is due the state courts' factual findings on habeas review. As to juror 24, we find no clear error. As to juror 22, however, we hold that a Batson violation did occur and reverse the district court's holding to the contrary.

The Missouri Court of Appeals and the district court both reached the conclusion that no Batson error occurred in this case by relying on the Missouri Supreme Court's decision in State v. Antwine, 743 S.W.2d 51 (Mo. 1987) (en banc) (Antwine), cert. denied, 486 U.S. 1017 (1988), which interpreted Batson.[5] Antwine has been cited with approval by

[5]Antwine was decided after the petitioner's state court trial, but before this case was heard on appeal before the

this Court. See Jones v. Jones, 938 F.2d 838, 844 (8th Cir. 1991). In Antwine, the Missouri Supreme Court commented on the legitimacy of a prosecutor's reliance on subjective grounds for exercising a peremptory challenge in the context of a Batson challenge. The Antwine court explained "we believe that Batson leaves room for the State to exercise its peremptory challenges on the basis of the prosecutor's legitimate 'hunches' and past experience, so long as racial discrimination is not the motive." 743 S.W.2d at 65. The court went on to explain:

> [w]e do not believe, however, that Batson is satisfied by "neutral explanations" which are no more than facially legitimate, reasonably specific and clear. Were facially neutral explanations sufficient without more, Batson would be meaningless. It would take little effort for prosecutors who are of such a mind to adopt rote "neutral explanations" which bear facial legitimacy but conceal a discriminatory motive. We do not believe the Supreme Court intended a charade when it announced Batson.

Id.

Missouri Court of Appeals.

On review of petitioner's Batson claim, the Missouri Court of Appeals noted that the prosecutor used less than all of his peremptory strikes to remove only two of the three African-American venire persons.[6] The state appellate court also noted that the victim was African-American, and that the state gave some explanation for the strikes. Citing Antwine, the Missouri Court of Appeals then concluded "[w]e believe the state's explanation constituted a legitimate 'hunch.'" State v. Elem, 747 S.W.2d at 775. On habeas review, the district court noted the Missouri Court of Appeals' finding of a legitimate "hunch." Giving the state courts' factual findings a presumption of correctness, the district court then concluded "[t]he record supports the Missouri Court of Appeals' finding of no purposeful discrimination." Slip op. at 8.

We believe that the Missouri Court of Appeals, and the district court on habeas review, took the Missouri Supreme Court's reference to "a prosecutor's legitimate 'hunches'" in Antwine out of context and, as a result, misapplied the standard intended in Batson. In Antwine, the

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[6]The Missouri Court of Appeals found it significant that the prosecutor struck only two out of three African-American venire persons. State v. Elem, 747 S.W.2d at 775. We have held that such numerical calculations are not sufficient to disprove the existence of a Batson violation. See Randolph v. Delo, 952 F.2d 243, 245 & n.3 (8th Cir. 1991) (per curiam).

Missouri Supreme Court recognized that a prosecutor's racially-neutral subjective intuitions may, in some circumstances, qualify as legitimate grounds for striking a prospective juror; yet the court was careful to caution "[w]e do not believe, however, that Batson is satisfied by 'neutral explanations' which are no more than facially legitimate, reasonably specific and clear. Were facially neutral explanations sufficient without more, Batson would be meaningless." Antwine, 743 S.W.2d at 65 (emphasis added).

In a case such as this, where the prosecution strikes a prospective juror who is a member of the defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least articulate some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror. In the present case, the prosecutor's comments, "I don't like the way [he] look[s], with the way the hair is cut . . . . And the mustache[] and the beard[] look suspicious to me," do not constitute such legitimate race-neutral reasons for striking juror 22.

In Hernandez, the Supreme Court declined to set aside the state courts' rejection of a Batson claim where the prosecutor struck two Spanish-speaking Latino jurors on grounds that, based upon their answers and demeanor in voir dire, he had doubts about their ability to defer to official translations during trial. The Supreme Court accepted this as

a plausible race-neutral basis for the strikes. 111 S. Ct. at 1867-68. However, the Supreme Court also observed "a policy of striking all who speak a given language without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination." 111 S. Ct. at 1873 (emphasis added). Similarly, in Batson, the Supreme Court explained "[t]he prosecutor . . . must articulate a neutral explanation related to the particular case to be tried." 476 U.S. at 98 (emphasis added).

Guided by the Supreme Court's decisions in Batson and Hernandez, and our interpretation of Antwine, we conclude that the prosecution's explanation for striking juror 22 in the present case was pretextual. The prosecutor's explanation was "facially neutral . . . without more," which is precisely what Antwine cautions against. 743 S.W.2d at 65. As stated in Hernandez, "[t]he credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." 111 S. Ct. at 1870. We thus hold, based upon the record as a whole, that the state trial court clearly erred in finding that the prosecutor's elimination of juror 22 was not intentionally discriminatory. Accordingly, we reverse the district court's ruling to the contrary and remand this case to the district court with instructions to grant the writ of habeas corpus on the basis of the violation of petitioner's equal protection rights under Batson. No evidentiary hearing in the district court will be necessary.

Having concluded that petitioner is entitled to habeas relief on his Batson claim, we need not reach petitioner's separate due process claim related to the apparent "joint" found by the jury in the gray sweatsuit. Presumably that inadvertent discovery will not recur if petitioner is retried, and the issue will become moot.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JIMMY ELEM,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cause No. 4:92CV1927JCH
	)	
JAMES PURKETT,	)	
	)	
Respondent.	)	

ORDER OF DISMISSAL

IT IS HEREBY ORDERED that Jimmy Elem's Petition for Writ of Habeas Corpus is **DENIED.**

Dated this 18th day of February, 1993

/s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JIMMY ELEM,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cause No. 4:92CV1927 JCH
	)	
JAMES PURKETT,	)	
	)	
Respondent.	)	

ORDER

This matter is before the Court pursuant to the Report and Recommendation filed by United States Magistrate Judge Terry I. Adelman on January 19, 1993. This case was referred to Magistrate Judge Adelman pursuant to 28 U.S.C. §636(b) for his review and recommendation as to Petitioner's Petition for Writ of Habeas Corpus. It is Magistrate Judge Adelman's recommendation that Petitioner's Application be dismissed without further proceedings.

On January 28, 1993, Petitioner filed objections to the Magistrate Judge's recommendation. In his objections, Petitioner does not address the issues raised in the Magistrate

Judge's Report; Petitioner merely reiterates the grounds set forth in his Petition.

After careful consideration of this matter,

IT IS HEREBY ORDERED that the Magistrate Judge's Report and Recommendation is **SUSTAINED, ADOPTED** and **INCORPORATED.**

IT IS FURTHER ORDERED that Petitioner's Application for Writ of Habeas Corpus is **DENIED.**

Dated this 18th day of February, 1993.

/s/ Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JIMMY ELEM,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cause No. 4:92CV1927
	)	(JCH) (TIA)
JAMES PURKETT,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter is before the Court on the petition of Jimmy Elem for a writ of habeas corpus under 28 U.S.C. § 2254. This cause was referred to the undersigned United States Magistrate Judge for a Report and Recommendation pursuant to 28 U.S.C. § 636(b).

I. **Procedural History**

Petitioner stood trial for second degree robbery in July of 1986. An Assistant Public Defender represented petitioner at trial. A jury found petitioner guilty and the trial court

sentenced him to twenty five years in prison as a persistent offender.

Petitioner appealed his conviction on two grounds: (1) that the trial court erred in overruling petitioner's objection to the state's use of peremptory challenges to strike two black persons from the jury panel; and (2) that the trial court erred in overruling petitioner's motion for mistrial when it was discovered the jury had considered evidence of an uncharged crime during its deliberations. Another Assistant Public Defender handled petitioner's appeal, which the Missouri Court of Appeals for the Eastern District denied. State v. Elem, 747 S.W.2d 772 (Mo.App. 1988) (Resp. Exh. E). Petitioner did not pursue post conviction remedies in state court.

Petitioner is currently incarcerated at Farmington Correctional Center. He filed the instant petition for writ of habeas corpus on August 10, 1992. Because the petition is pro se, the Court must liberally construe the pleadings, Hill v. Wyrick, 570 F.2d 748, 751 (8th Cir), cert. denied, 436 U.S. 921 (1978). The petition lists ten points of alleged error:

I. petitioner asserts he received no Miranda warnings;

II. petitioner asserts there was insufficient evidence to convict him and that the trial court erred in admitting certain items of physical evidence;

III. petitioner asserts that he was convicted through the use of "incredibly bad police work";

IV. petitioner asserts that the trial court erred in refusing to declare a mistrial when it was discovered that the jury members found an unidentified item appearing to be a marijuana "joint" in a jogging suit admitted into evidence;

V. petitioner asserts that the trial judge abused his discretion by allowing "hearsay testimony" given by the jury foreperson concerning the basis for the conviction;

VI. petitioner asserts the prosecutor introduced evidence concerning two "un-known and/or alleged" witnesses, thereby depriving petitioner of the right to confront his accusers;

VII. petitioner asserts the trial court erred in overruling petitioner's objection to the prosecutor's use of peremptory strikes to remove black persons from the jury panel;

VIII. petitioner asserts that the prosecutor engaged in improper and prejudicial argument;

IX. petitioner asserts that his trial counsel was incompetent in failing to: (1) inspect the jogging suit;
(2) object to improper prosecutorial argument;
(3) request a lesser included offense instruction;

(4) discover the identity of the "unknown juror"; and
(5) object to the faulty information;

X. petitioner asserts that the original information charging him with Robbery in the Second Degree was fatally defective in that it did not indicate that he stole over $150.00.

Respondent concedes exhaustion of petitioner's claims but contends that all but two of the claims are procedurally barred due to petitioner's failure to present them to the state courts. Respondent also argues that the two claims petitioner did preserve on appeal are without merit.

Claims Not Raised in State Court

A state prisoner is not entitled to habeas relief unless he has exhausted the remedies available to him in state court. 28 U.S.C. § 2254(b). The Eighth Circuit explained the exhaustion doctrine in Smittie v. Lockhart, 843 F.2d 295, 296 (8th Cir. 1988). First, the District Court must determine whether the federal constitutional dimensions of the habeas corpus claims were fairly presented to the state courts. If not, the Court must determine whether the exhaustion requirement has been met because no non-futile state court remedies exist. The District Court must then determine whether or not adequate cause exists to excuse the failure to present the claims to the state courts. If sufficient cause exists, petitioner must demonstrate "actual prejudice to his defense resulting from the state court's failure to address the merits of the

claim." Id. at 296. The District Court must dismiss the habeas petition unless it survives each level of analysis.

Petitioner failed to present claims I, II, III, V, VI, VIII, IX and X to the state courts. Not only did petitioner neglect to raise the claims on appeal, he did not pursue a post conviction motion pursuant to Missouri Rule 29.15. As respondent points out, these claims are technically exhausted because petitioner has no currently available state remedies. This Court still cannot reach the merits of the claims, however, unless petitioner demonstrates adequate cause to excuse his state default and actual prejudice resulting from the default. Wainwright v. Sykes, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506, reh'g denied, 434 U.S. 880 (1977); Stokes v Armontrout, 893 F.2d 152, 155 (8th Cir. 1989). The federal court may excuse petitioner's failure to show cause and prejudice only where petitioner can "demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice," Kennedy v. Delo, 959 F.2d 112, 115 (8th Cir. 1992) (quoting Coleman v. Thompson, ___ U.S. ___, 111 S.Ct. 2546, 2565 (1991).

Petitioner has failed to assert either cause or prejudice with respect to his procedural default of any of these claims and has not shown any facts to warrant concern about a fundamental miscarriage of justice.[1] As such, claims I, II, III,

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[1]The Supreme Court has recently articulated a new test for determining whether habeas petitioners have met the

V, VI, VIII, IX and X are pro-cedurally barred from review by this Court and should be dismissed. Stanley v. Jones, 973 F.2d 680 (8th Cir. 1992).

Claims Addressed on the Merits

Petitioner raised claims IV and VII both in his Motion for New Trial and on appeal in the Missouri courts. This Court will therefore consider the merits of those claims.

Ground IV

Petitioner asserts the trial court erred in failing to declare a mistrial when the court discovered that the jury found what appeared to be a "joint" or marijuana cigarette in a sweat suit admitted into evidence. Petitioner contends the "joint" amounted to evidence of an uncharged crime, and that the jury's exposure to such evidence warranted a mistrial.

"miscarriage of justice" standard. In order to have a procedurally defaulted claim evaluated on its merits when there has been no showing of cause and prejudice, the habeas petitioner "must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner (guilty) under the applicable state law." McCoy v. Lockhart, 969 F.2d 649, 651 (8th Cir. 1992) (quoting Sawyer v. Whitley, ___ U.S. ___, 112 S.Ct. 2514, 2515 (1992)).

The trial court, in considering petitioner's motion for new trial, heard the testimony of Gwyn Harvey, the jury foreperson:

> [Under direct examination by the Assistant Prosecuting Attorney]:
>
> Q. And you've listened to the argument just presented to the Court about something found in one of the pieces of evidence?
>
> A. I have.
>
> Q. What was--Do you know what was found?
>
> A. A white, rolled up, tubular looking, I don't know what it was.
>
> Q. In the discussions that occurred in the jury room on this case, what was said with regard to the thing that was found?
>
> A. Not everybody handled it, and people were not sure what it was. I personally thought it was just a piece of paper that had gotten rolled up in washing. Other people thought it was some kind of cigarette, a joint.

Q. Did anyone know whether it was marijuana?

A. Nobody knew.

Q. How much emphasis was placed on that piece--that thing that you are talking about right now, that rolled up piece of paper, whatever it may be, how much emphasis did the jury place on that in deliberations?

A. We didn't discuss that at all other than at the point in time at which it was found. Very little time was spent on it.

Q. And you were there for the entire deliberations and participated in them?

A. I was.

Q. Did the piece of paper in your opinion in any way, or whatever it was that was rolled up, let's say it was a cigarette, did the rolled up cigarette in any way in your opinion place--or was any emphasis placed on that in your deliberations in determining whether the defendant was guilty or not guilty?

A. Not at all.

(Resp. Exh. A-3 at 8-10). Based on Ms. Harvey's testimony, the trial judge denied the motion for new trial. (Resp. Exh. A-3 at 18).

After reviewing the transcript of the above noted evidentiary hearing to determine whether the "joint" had prejudiced petitioner, the Missouri Court of Appeals ruled that the trial judge's decision to deny petitioner's request for mistrial had been correct:

> The declaration of a mistrial is a drastic remedy that should be employed only in those drastic circumstances in which the prejudice to the defendant can be removed in no other way. The decision to declare a mistrial rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of abuse of discretion. State v. Burroughs, 740 S.W.2d 272, 274 (Mo.App. 1987). . . . [The state] made a strong case. We find no prejudicial error.

State v. Elem, 747 S.W.2d at 775. (Resp. Exh. E).

State court factual findings are entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(d). Sumner v. Mata, 449 U.S. 539, 544-46 (1981). As the state court's finding of no prejudice is amply supported by the

record (See Resp. Exh. A-3), this Court should afford that finding due deference. Petitioner's fourth claim should be denied.

Ground VII

In his seventh claim for relief, petitioner contends the trial court erred in overruling his objections to the prosecutor's use of peremptory challenges to strike two of the three black persons from the jury panel. Under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), a criminal defendant establishes a prima facie case of discrimination in selecting the jury panel by demonstrating that the prosecution's use of peremptory challenges and other relevant circumstances raise an inference that the government excluded the individuals from the jury due to their race. In State v. Antwine, 743 S.W.2d 51 (Mo. banc 1987), cert. denied, 486 U.S. 1017 (1988), the Missouri Supreme Court held that the trial court must consider the prosecutor's explanation for striking the veniremen in determining whether there is a prima facie case of discrimination.

During the voir dire in this case, when the defense objected to the striking of the two black men from the jury panel, the prosecutor explained that the men were the only two individuals on the panel with facial hair, and that he did not like the way they looked (Resp. Exh. A-1 at 61). Additionally, the prosecutor noted that one of the men had been the victim of a supermarket robbery involving a

shotgun. The prosecutor reasoned, ". . . maybe he would feel to have a robbery you have to have a gun, and there is no gun in this case." Id. The trial court accepted the prosecutor's reasons for removing the potential jurors and overruled the defense objection. Id. at 62.

In reviewing the trial judge's decision, the Missouri Court of Appeals considered the law under Batson, Antwine, and two Eighth Circuit cases. The Court of Appeals determined that the prosecutor's reasons for striking the men constituted a legitimate "hunch" pursuant to Antwine: "The circumstances fail to raise the necessary inference of racial discrimination, and the court did not err in denying defendant's objection to the jury panel." State v. Elem, 747 S.W.2d at 775 (Mo.App. 1988) (Resp. Exh. E).

As noted above, this Court will afford a presumption of correctness to state court factual findings. State court Batson determinations are findings of fact entitled to such a presumption. Jones v. Jones, 938 F.2d 838, 841-43 (8th Cir. 1991). The record supports the Missouri Court of Appeals' finding of no purposeful discrimination (See Resp. Exh. A-1 at 58-62), and this Court will give the finding due deference. Petitioner's seventh claim should be denied.

Recommendation

For the foregoing reasons, the undersigned United States Magistrate Judge recommends that Jimmy Elem's

petition for writ of habeas corpus be dismissed without further proceedings.

The parties are advised that they have eleven (11) days in which to file written objections to this Report and Recommendation. The failure to file timely objections may result in the waiver of the right to appeal questions of fact. Thompson v. Nix, 897 F.2d 356, 357 (8th Cir. 1990).

/s/Terry I. Adelman
UNITED STATES MAGISTRATE JUDGE

Dated this 19th day of January, 1993

Missouri Court of Appeals,
Eastern District,
Division One.

March 29, 1988.

STATE of Missouri,
Plaintiff-Respondent,

v.

Jimmy Dean ELEM,
Defendant-Appellant,

No. 52142

REINHARD, Judge.

Defendant was convicted by a jury of second-degree robbery and was sentenced by the court as a persistent offender to 25 years in prison. He appeals; we affirm.

The victim, a black woman, was walking home from work on October 5, 1985, at about 11:00 p.m. A black man, wearing grey sweat pants, a grey, hooded sweat shirt, and white high-top tennis shoes jogged past her from behind, ran

ahead, and then turned and jogged toward her. She saw his face as he approached because the area was well-lighted. As he passed, he grabbed her, pulled her into an adjacent vacant building, and hit her. He demanded money and threatened her with a bottle he broke against a wall. She pulled away from him and ran back to the street, where he caught her purse, breaking its handle and snatching it from her. She again saw his face. He fled into a dead-end street and then south across a small park. The victim, along with two black women in a car who had seen the man steal the purse, followed him as far as the dead-end. The victim noticed the man had "french-braided" hair.

Officer John Bridges of the Wellston Police Department spoke to two black women in a car at the police station and again near a liquor store, which was a few blocks south of the scene of the incident. At the liquor store Bridges detained defendant, who was at the liquor store, asking for a clothes hanger to open his car; he said he had locked his keys in his car. Defendant was wearing cut-off blue jeans, a T-shirt, and white high-top tennis shoes despite the fact that the weather was "chilly," and he was the only person at the liquor store in shorts. Bridges noticed defendant was perspiring and his hair had french braids. He took defendant to the vacant building, the scene of the assault, where the victim, sitting in another officer's car, identified him as her assailant. Another officer found grey sweat pants, inside out and with burrs stuck to them, a grey, hooded sweat shirt, and the victim's purse under a car parked near the liquor store. The victim

identified the sweat pants and sweat shirt as those worn by the robber.

In his principal point on appeal defendant contends the court erred in overruling his objection to the state's use of peremptory challenges to strike black persons from the jury panel. He alleges this error led to a denial of his due process rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

The venire consisted of 25 persons, including three blacks, jurors 16, 22, and 24. Each party had six peremptory challenges. The state struck two black males, jurors 22 and 24, and left on the panel a black female, juror 16. After defendant objected to the jury panel, the prosecutor indicated he struck juror 22 because of his shoulder-length, unkept, curly hair, which was "the longest hair of anyone on the panel," and because of his mustache and "goatee-type beard." Juror 24 also had a mustache and a goatee-type beard. The prosecutor stated he didn't "like the way they looked" and he believed they would not be good jurors. They were the only two on the venire who had facial hair. Further, juror 24 had been at a supermarket when a robbery had occurred, and a man pointed a sawed-off shotgun at him during the incident. The prosecutor said he did not want him on the jury in this case, which did not involve a gun, because he might feel that a robbery required a gun. The court denied the motion attacking the penal.

Under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 1722-23 (1986), a prima facie case of purposeful discrimination in the selection of a jury panel is established by showing that the government's use of its peremptory challenges and any other relevant circumstances "raise an inference that the prosecutor ... exclude[d] ... veniremen from the petit jury on account of their race." The Missouri Supreme Court first considered the *Batson* standard in *State v. Antwine*, 743 S.W.2d 51 (Mo. banc 1987), and held the trial court must consider the prosecutor's explanation as part of the process of determining whether a defendant has established a prima facie case of racially discriminatory use of peremptory challenges. *Antwine*, 743 S.W.2d at 64. The state may rely on the prosecutor's legitimate "hunches" and experience so long as race is not the motive. *Id.* at 65. This case was tried after *Batson* was decided but before the decision in *Antwine*.

In *United States v. Ingram*, 839 F.2d 1327 (8th Cir. 1988), a venire of 35 persons included two blacks. The prosecutor utilized one of six peremptory challenges to strike one of the two blacks. The defendant, a black man, moved for a mistrial based on the government's unconstitutional use of its challenges in violation of *Batson*. The district court denied the motion without requiring the prosecutor to provide an explanation for his strike. The United States Court of Appeals, Eighth Circuit, held that the trial court implicitly found the defendant had failed to establish a prima facie case as required by *Batson*. In affirming, the court said,

In this case, the defendant, in support of his argument that a prima facie case of discrimination has been established, relies solely on the fact that the prosecution struck one of two potential black jurors. The Eighth Circuit has said that "bare reliance on the fact that the government used one of its peremptory challenges to exclude one of the two black veniremen falls short of raising an inference of purposeful discrimination necessary to establish a prima facie case under *Batson*." *[United States v.] Porter*, 831 F.2d [760,] 767-68 (8th Cir. 1987)]. *See United States v. Montgomery*, 819 F.2d 847, 851 (8th Cir.1987). We conclude that the facts and circumstances of this case likewise do not raise the necessary inference of discrimination and that the district court was correct in overruling the motion for a mistrial without further inquiry of the prosecutor.

Ingram, 839 F.2d at 1330 (footnote omitted).

Another eighth circuit case similar to the present case is *United States v. Montgomery*, 819 F.2d 847 (8th Cir. 1987). In *Montgomery* the court set forth the following facts:

There were a total of four black persons available for selection as jurors, making up 14% of the venire. The government used two of its six strikes (33%) to eliminate two of the four black members of the venire. The defendant then used one peremptory challenge to strike one of the two potential remaining black jurors, so that the actual jury consisted of eleven whites and one black.

Although the jury accepted by the government included two blacks, Montgomery asserts that these percentages indicate that black members of the jury panel were peremptorily struck at a rate in excess of double of that which a proportionate striking of blacks would have resulted in. He requests that his case be remanded pursuant to *Batson* for the district court to determine whether he has a *prima facie* case of purposeful discrimination and whether the government had permissible reasons for the strikes.

In rejecting the defendant's claim, the court of appeals said,

> The facts and circumstances in the present case do not raise such an inference of racial discrimination. The fact that the government accepted a jury which included two blacks, when it could have used its remaining peremptory challenges to strike these potential jurors, shows that the government did not attempt to exclude all blacks, or as many blacks as it could, from the jury. *Batson* does not require that the government adhere to a specific mathematical formula in the exercise of its peremptory challenges. Accordingly, we hold that the district court did not err in denying Montgomery's motion to dismiss the jury panel.

Montgomery, 819 F.2d at 851 (citation omitted).

Here, the three blacks made up 12 percent of the panel, compared to the 14 percent in *Montgomery*. In both cases the government used 33 1/3 percent of its peremptory challenges to strike black veniremen. Moreover, additional factors support the trial court's ruling here that were not present in either *Ingram* or *Montgomery*. The victim was black, and the state gave an explanation. We believe the state's explanation constituted a legitimate "hunch." *See Antwine*, 743 S.W.2d at 65. The circumstances fail to raise the necessary inference of racial discrimination, and the court did not err in denying defendant's objection to the panel.

Defendant also contends the court erred in refusing to declare a mistrial when it was discovered the jury had considered evidence of an uncharged crime during its deliberations.

During trial the grey sweat pants and sweat shirt were admitted into evidence without objection. While the jurors were deliberating, the court permitted them to examine the clothing without objection. One juror apparently discovered a tightly rolled piece of paper in the pocket of the sweat shirt, which appeared to some jurors to be a "joint" or marijuana cigarette. The jurors informed the bailiff, and subsequently defendant requested a mistrial because the "joint" was evidence of a crime with which defendant was not charged. The court refused to declare a mistrial. It examined the

garments and the rolled paper, stating it was impossible to determine what the rolled paper was or if it was a "joint" and found defendant suffered no prejudice from the jury's consideration of the item.

Prior to sentencing, the court held a hearing on defendant's contention in his motion for new trial that the court erred in refusing to grant a mistrial based on the jury's discovery of the "joint." The state argued defendant had not been prejudiced by the discovery and presented the testimony of the foreperson of the jury, Gwyn Harvey.

The declaration of a mistrial is a drastic remedy that should be employed only in those extraordinary circumstances in which the prejudice to the defendant can be removed in no other way. The decision to declare a mistrial rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Burroughs*, 740 S.W.2d 272, 274 (Mo.App.1987).

The circumstances here are similar to those in *State v. Beasley*, 731 S.W.2d 255 (Mo.App.1987). In *Beasley*, during its deliberations, the jury examined an overnight bag carried by defendant and inside it found some seeds and leaves, which some jurors speculated were tobacco or marijuana. We found no prejudicial error in the trial court's refusal to declare a mistrial after conducting a special voir dire of the jury panel. *Beasley*, 731 S.W.2d at 256-57. Although the trial court in *Beasley* held a more extensive hearing on the issue

than did the trial court here, in substance we held in *Beasley* that the defendant suffered no prejudice because of the strength of the state's case. *Id.* at 257. The state in this case also made a strong case. We find no prejudicial error.

Judgment affirmed.

GARY M. GAERTNER, P.J., and CRIST, J., concur.

State of Missouri)
)
v.) Cause No. 539718
) Court of Appeals
Jimmy Dean Elem) No. 52142

Transcript on Appeal

Page 58

(The Court convened at 3:15 p.m., and the further following proceedings were had:)

THE COURT: Gentlemen, is the jury that is seated, the jury that you have selected?

MR. LARNER: Yes, Judge.

MR. GOULET: May we approach the bench, Judge.

THE COURT: You may.

(Counsel approached the bench and the following proceedings were had:)

MR. GOULET: Your Honor, the defendant at this time would make the motion that this is not a jury of the defendant's peers and that –

THE COURT: This is the jury you have selected?

MR. GOULET: That the State has struck --

THE COURT: Let me get you on the record, this is the jury you have selected?

MR. GOULET: Yes, it is, your Honor.

THE COURT: All right.

MR. GOULET: The State has made preemptory [sic] strikes of two of the three eligible blacks on this jury panel. And, therefore, we consider that prejudice to the defendant's case.

THE COURT: Well, I don't know whether or not the State has struck whites or blacks, because I have no recollection of the color of any of their strikes. But, Mr. Larner, you may want to respond to that.

MR. LARNER: Well, that there has been no finding that I struck in that regard, I don't have to respond. However, I will respond, because it is an inaccurate statement by the defense. There appears to me, as I look at the jury right now, that there are black people on the jury which I did not strike. Mr. Goulet is saying that I struck jurors that were black, he said two of three. I don't believe there is any record to indicate how many black people there were on the

panel before we started. But to respond to this, I don't know which jurors he is referring to that he says that I struck.

MR. GOULET: May I get my jury list?

THE COURT: You may do so.

MR. GOULET: In the first twenty-five venire people[,] three were black. The first being Ms. Kemp-Jones, number sixteen. The second one being Mr. Tommy Moody, number twenty-two. And the third being Mr. William Hunt, number twenty-four. Those were the available panel and the State has struck two out of those three. Those being number twenty-two, Tommy Moody, and number twenty-four, William Hunt.

MR. LARNER: In response, your Honor, I don't think there has been any evidence that any statements by the people on the voir dire as to whether or not they were black. I think that he is referring to, he says number sixteen, number twenty-two, and number twenty-four. I don't know if all three of those people are, in fact, black. There has been no testimony to that and the fact now whether or not they are what he said was inaccurate, because number sixteen I did not strike, that's a female.

MR. GOULET: I think my statement was that he struck two out of three. That's not inaccurate, he kept one.

MR. LARNER: Your Honor, I don't know that there is any evidence that there were three on the panel. Now, I am saying that Shaun Goulet just said there was [sic] number sixteen, number twenty-two and number twenty-four, that he is assuming are black. Those are the three he mentioned. I did not strike number sixteen. I struck number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkept hair. Also, he had a mus-tache and a goatee type beard. And juror number-twenty-four also has a mustache and a goatee type beard. Those are the only two people on the jury, numbers twenty-two and twenty-four with facial hair of any kind of all the men and, of course, the women, those are the only two with the facial hair. And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me. And number twenty-four had been in a robbery in a supermarket with a sawed-off shotgun pointed at his face, and I didn't want him on the jury as this case does not involve a shotgun, and maybe he would feel to have a robbery you have to have a gun, and there is no gun in this case.

MR. GOULET: May I respond, your Honor?

THE COURT: Yes.

MR. GOULET: Mr. Larner stated that the reason he struck was because of facial hair and long hair as prejudicial. Number twenty-four, Mr. William Hunt, was a victim in a robbery and he stated that he could give a fair and impartial hearing. To make this a proper record if the Court would like to call up these two individuals to ask them if they are black or will the Court take judicial notice that they are black individuals?

THE COURT: I am not going to do that, no, sir.

MR. GOULET: Okay. Nothing further.

MR. LARNER: Your Honor, I will state and ask the Court to look at the first twenty-four people on the jury panel that numbers twenty-two and twenty-four are the only people with facial hair, that is, a mustache or a beard. And twenty-two and twenty-four both have mustache and beard.

THE COURT: All right.

(The proceedings returned to open court.)

THE COURT: Those of you that were not selected to serve in this case we are going to excuse you at this time and send you back up to the sixth floor to the jury assembly room for reassignment in a matter. Before you go, however, on behalf of the parties and their attorneys and this Court, I would like to thank each of you for coming down here.

Obviously, it is a physical impossibility to seat the thirty-four that we call down into that jury box that is designed to hold fourteen individuals, but it was absolutely essential that we call thirty-four of you for the system to function. Again, thanks for coming down. Now, we will send you back up to the sixth floor for reassignment.

Now, ladies and gentlemen, with the exception of Mr. Braun and Ms. McClain, will the jury please rise and raise your right hand and be sworn.

(The jury selected to try the case was duly sworn by the Clerk of the Court.)

THE COURT: Now, Mr. Braun and Ms. McClain, we have a special oath for you. If you will please rise and raise your right hand.

(The alternate jurors were duly sworn by the Clerk of the Court.)

[Pages 58-63 of the Transcript on Appeal in State of Missouri vs. Jimmy Dean Elem, No. 539718, Court of Appeals No. 52142, Division No. 6, Circuit Court of the County of St. Louis, the Honorable Robert W. Saitz presiding]

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 93-1793EMSL

Jimmy Elem,	*	
	*	
Appellant,	*	
	*	Order Denying
vs.	*	Petition for
	*	Rehearing and
James Purkett,	*	Suggestion for
	*	Rehearing En Banc
Appellee.	*	

The suggestion for rehearing en banc is denied. Judge Bowman, Judge Beam, and Judge Morris Sheppard Arnold would grant the suggestion.

The petition for rehearing by the panel is also denied.

July 28, 1994

Order Entered at the Direction of the Court:

--Michael E. Gans--
Clerk, U.S. Court of Appeals, Eighth Circuit

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT

Name: JIMMY DEAN ELEM
Prisoner No. 157650
Case No. 4:92CV001927
Place of Confinement: FARMINGTON CORRECTIONAL CENTER

Name of Petitioner (include name under which convicted) JIMMY DEAN ELEM V. (Name of Respondent (authorized person having custody of petitioner) JAMES PURKETT, et al.,

The Attorney General of the State of Missouri: WILLIAM WEBSTER

PETITION

1. Name and location of court which entered the judgment of conviction under attack: CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI, DIVISION NO. 6

2. Date of judgment of conviction: JULY 30, 1986

3. Length of sentence: 25 YEARS

4. Nature of offense involved (all counts): ROBBERY IN THE SECOND DEGREE

5. What was your plea? (Check one):
(a) Not guilty X
(b) Guilty ___
(c) Nolo contendere ___

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
(a) Jury X
(b) Judge only ___

7. Did you testify at the trial?
Yes ___ No X

8. Did you appeal from the judgment of conviction?
Yes X No ___

9. If you did appeal, answer the following:

(a) Name of court: MISSOURI COURT OF APPEALS, EASTERN DISTRICT

(b) Result: AFFIRMED

(c) Date of result and citation, if known: MARCH 29, 1988

(d) Grounds raised: POINT I. VOIR DIRE, POINT II. INADMISSIBLE EVIDENCE OF AN UNCHARGED CRIME

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court: n/a

(2) Result: n/a

(3) Date of result and citation, if known: n/a

(4) Grounds raised: n/a

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court: n/a

(2) Result: n/a

(3) Date of result and citation, if known: n/a

(4) Grounds raised: n/a

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ___ No. X

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: n/a

(2) Nature of proceeding: n/a

(3) Grounds raised: n/a

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ___ No. X

(5) Result: n/a

(6) Date of result: n/a

(b) As to any second petition, application or motion give the same information:

(1) Name of court: n/a

(2) Nature of proceeding: n/a

(3) Grounds raised: n/a

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ___ No. X

(5) Result: n/a

(6) Date of result: n/a

(c) Did you appeal to the highest state court having jurisdiction the result ofaction taken on any petition, application or motion?

(1) First petition, etc.
Yes X No ___

(2) Second petition, etc.
Yes ___ No ___ n/a

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: n/a

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: SEE ATTACHED PAGES
Supporting **FACTS** (state *briefly* without citing cases or law): SEE ATTACHED PAGES

B. Ground two: SEE ATTACHED PAGES
Supporting **FACTS** (state *briefly* without citing cases or law): SEE ATTACHED PAGES

[————————————————
Petitioner's added pages in petition——]

12. **a. Ground one:** No Miranda before, after, during, and/or prior to petitioner[']s arrest. This contention is best supported by the in court testimony of the official record. to-wit:

1. Transcript of Appeal, June 12, 1986 - page 8, line 9; goes to petitioner's state of mind and belief at the time, pages 21 - 23.

2. Trial Transcript, of July 27, 1986 - pages 71 - 73, 98, 203, 207 - 209, 224, 276 - 277, 281, and 292 (State's Opening Statement).

3. Defendant's Motion to Suppress Statements at pages 10 - 12 of petitioner's Legal File. to-wit:

Supporting **FACTS:** **MOTION TO SUPPRESS STATEMENTS** The petitioner, by and through his attorney, and moves the court to suppress all alleged statements, oral, written, videotaped or otherwise recorded, which the State intends to use in evidence against the petitioner.

PETITIONER INCORPORATES BY REFERENCE SECTIONS A AND C OF THE ABOVE-

STYLED MOTION AND A PART OF PETITIONER'S OFFICIAL LEGAL FILE.

B. Said statement(s) was made without the petitioner first being advised of his constitutional rights, to-wit:

1. Petitioner was not advised in clear and unequivocal terms of his right to remain silent prior to his interrigation [sic].

2. The petitioner was not advised that anything that he said could and would be used against him in a court of law.

3. The petitioner was not advised of his right to consult with a lawyer and to have a lawyer present with him during the interrogation.

4. Petitioner was not advised that a lawyer would be appointed for him if he was indigent.

5. Petitioner did not waive his right to remain silent, or his right to counsel, or his right to to [sic] have counsel appointed to him.

6. The interrogation by said police officers did not cease when petitioner indicated that he wished t [sic] to remain silent, and that he

desired to have appointed counsel present on his behalf at said interrogation.

Petitioner asserts that he would like for this Court to consider this point in connection with petitioner's claim of the bad police work in this case. Petitioner would also like to add another important element leading up to all the bad police work and the blatant violation of petitioner's most basic and fundamental rights and the **arresting officer, was a "Reserve " officer.** Which petitioner asserts and/or contends is a mitigating factor of both the bad police work and his failure to timely and/or properly mirandize the petitioner.

All of the matters herein mentioned were in violation of the constitutional rights of the defendant/petitioner under the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and under Article I, Section 19 and Article I, Section 10 of the Missouri Constitution.

12. B. Ground two: INSUFFICIENCY OF THE EVIDENCE: Petitioner asserts that there exist both irrefuttable [sic], contradictory and inconsistent testimony at the state court as to the material facts and/ or in the evidence presented in this cause of action now before the Court. That unequivocally gives rise to a valid claim of a travesty on injustice herein. When this cause is decided on each of the claims (9) raised herein; and/or each are [sic] considered

herein in an overall and/or the cumulaive [sic] effect, as to the or any final outcome. to-wit:

Petitioner challenges:

A.) Chain of custody as to State's Exhibits 1, 2, and 3;

B.) Lack of inculpatory evidence, (i.e. no whiskey bottle, no fingerprints);

C.) (Un)Reliability of the out-of-court identification (i.e. facial, voice, hair, and lighting);

D.) Comparative contradictory and/or inconsistent versions in testimony as to the material facts as to what actually happen[ed] in this case. to-wit:

Supporting **FACTS:**

A.) Petitioner seeks to challenge the chain of custody as to State's Exhibits 1 and 2 (jogging suit) and 3 (victim[']s purse).

Petitioner asserts the trial court erred in admitting into evidence the sweat-pants, sweat-shirt, and the handbag as there was no proper foundation laid. In addition, the trial court erred in admitting said items into evidence as said items lacked proper chain of custody. Said errors on the part

of the trial court resulted in a violation of petitioner's rights to due process and equal protection under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Subsections 10, 15 and 18 (a) of the Missouri Constitution and the Missouri Supreme Court Rules of Criminal Procedure.

Petitioner relies upon the:

1. Trial Transcript, of July 27, 1986 - at page 79, 99, 128, 139, 184, 216 -217, 245 -246, and 255;also, at page 77; on Direct Examination: of Police Officer GROH, " ... No forensic test conducted of evidence, jogging suit, or purse ... see also pages 78, 91-92, 108-111, and 196-198...".

B.) Petitioner seeks to challenge the lack of any inculpatory evidence; such as no whiskey bottle or no fingerprints that when testimony was offered into evidence that petitioner threaten[ed] to beat the victim with, bust her head with, or he would kill her with this alleged object. A most critical piece of inadmissible evidence and/or testimony that was allowed to prejudice petitioner's trial. Petitioner asserts that because the State introduced this evidence and/or testimony that the State has open[ed] up the door for rebuttal and challenge. Petitioner asserts had this critical evidence been properly preserved and entered into evidence at trial; then the petitioner could have just as easily utilized it to his advantage; for which evidence could have just as easily exonerated the petitioner.

PETITIONER relies upon the:

1. Trial Transcript, of July 27, 1986 - at pages 101 - 102, 125, 147 -150, 164, 186, 191, 216 -217, 246, and 268 - 269;

2. Legal File, at page 15:(i.e. Defendants motion to suppress physical evidence is **sustained...**).

C.) Petitioner seeks to challenge the unreliability and/or the questionable out-of-court identification of petitioner (i.e. facial, voice, hair, and inadequate lighting). In that there exist in the official transcripts numerous and/or too many critical and prejudicial contradictions and inconsistencies in the version as to the actual chain of events that led up to petitioner's suggestive and tainted identification. to-wit:

Petitioner relies upon the:

1. **Transcript** for the Purpose of Appeal, June 12, 1986 - at pages 11 and 24;

2. Transcript at Trial, July 27, 1986 - at pages 136, 141, 143, 145, 149-152, 165, 155-158, 160, 165, 172 (vs. 234), 174, 228, and 235-236; 253-254, 262, and 267; and 75, 288, and 291 (States Opening Statement);

3. Transcript of Appeal, August 29, 1986 - at page 10.

Petitioner asserts and hopes to show how the victim[']s in-court testimony about petitioner's hair, was a key identifying feature (Tr. p. 151) is inconsistent and contradicts the victim[']s handwritten police report. Victim's in-court testimony has been both rehearsed and embellished with the assistance of the State (Tr. page 160-161 and 174).

D.) Petitioner seeks to challenge the critical and prejudicial contradictory and inconsistent versions of all the witnesses in-court testimony; as to their version of the chain of events that led up to petitioner's illegal conviction. to-wit:

Petitioner relies upon the:

1. Trial Transcript of July 30, 1986 - at pages 79-80, 89-90, 98-100,(vs. 196-197), 108-109 (vs. 230), 149-153,155, 158, 167,(vs. 244-245), 169 (vs. 251), 169 and 251 (vs.229).

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back to Petition form----------]

[12] C. Ground three: SEE ATTACHED PAGES
Supporting FACTS (state *briefly* without citing cases or law):
SEE ATTACHED PAGES

D. Ground four: SEE ATTACHED PAGES

Supporting FACTS (state *briefly* without citing cases or law):
SEE ATTACHED PAGES

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: ALL PETITIONER'S GROUNDS RAISED HEREIN WITH THE EXCEPTION OF PETITIONER'S CHALLENGE OF VOIR DIRE, POINT 7 AND INADMISSIBLE EVIDENCE OF AN UNCHARGED CRIME, POINT 4.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ___ No X

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: SHAWN GOULET, ADDRESS UNKNOWN

(b) At arraignment and plea: SHAWN GOULET, ADDRESS UNKNOWN

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Return to added pages by petitioner---]

12. C. **Ground three:** Petitioner seeks to challenge the incredibly **bad police work** in this case or the minimal degree of and/or lack of police work done in this case. Petitioner also presents this Court with the question of just how deficient or bad does the police work have to be " **before** " it rises to or is rendered to be a violation of Petitioner's protected constitutional rights? In that, in the instant case; these are critical and crucial factors to be considered:

Supporting **FACTS:**

(a) The arresting officer was only and at best, " **a Reserved**U" officer and has admitted in-court that he had worked sixteen (16) hours the day of petitioner's arrest (at his other job) and which may explain; the why of (b);

(b) The arresting officer failed to mirandize petitioner of his constitutional rights;

(c) The[re] was no investigation conducted in this case (i.e. fail to preserve identification of two black female witnesses, no evidence of

whiskey bottle or fingerprints collected, fail to properly inspect State's Exhibit's [sic] 1 and 2 (jogging suit) for proof of ownership, and the fact that six (6) or seven (7) seperate [sic] police officers were involved in petitioner's arrest and only one (1) single police report was filed.).

1. Transcript Purpose of Appeal, June 12, 1986 at pages 18 - 21;

2. Transcript at Trial, July 27, 1986 - at pages 97, 99-102, 108-110, 164, 171, 186, 196, 198, 205, 215, 222, 225, 233, 239-240, 252, 261, 265-266, 304-305, and States Opening Argument (v. 296-297) and States Closing Argument (v. 297-298);

3. Transcript on Appeal, August 29, 1986 at pages 4-5 and 14-17.

12. **D. Ground four:** Prejudicial evidence of an uncharged crime and outside the scopr [sic] of pleadings - Marijuana that was discovered and being allowed into evidence; " **after** " jury retired for deliberations. Petitioner states that when the jury had retired for its deliberations.

Supporting **FACTS:** At 10:05 a.m. (T.301) and at 10:35 a.m. the jury requested the State's Exhibits 1 and 2, the jogging suit [top and bottom] and it was sent in to them (T.305).

While examining the sweat shirt one of the jurors discovered what appeared to be a marijuana cigarette of " **joint** " in one of the pockets (S.11). When the bailiff (Mr. Enright) entered the jury room to deliver lunch at approximately 12:15 p.m., one of the jurors (i.e. allegedly unknown) told him, **"We found a ' joint ' in the jogging suit"** (T.306). Before the jury returned it[s] verdict, and more importantly, prior to the jury finding this prejudicial and incriminating evidence, the jurors **stood seven to five for acquittal** (Tr. App. 6 and 14). Before the jury returned its verdict, petitioner learned of the jury's discovery and made a motion for mistrial (Tr. 302). The motion was overruled (Tr. 305). Petitioner relies further on the facts that are delineated in the body of his arguments of his Appeal Brief at pages 9 thru 13.

Petitioner asserts that the trial court erred in overruling petitioner's Motion for Mistrial, when timely raised. For this is clearly evidence of an uncharged crime and is highly prejudicial and inflammatory. This type of evidence, of an uncharged crime, is inadmissible and irrelevant and caused the jury to convict petitioner on an improper basis. Said error of the trial court directly led to a denial of petitioner's due pro-cess rights under the Fourth, Fifth, Sixth, and Fourteenth Amendment to the United States Constitution, and Article I., Subsections 10, 15, and 18 (a) of the Missouri Constitution.

PETITIONER RELIES UPON THE:

1. Transcript Purpose of Appeal, June 12, 1986 - at pages 1-2, 6, 14, and 23-25;

2. Trial Transcript of July 30, 1986 - at pages 302-318;

3. Transcript on Appeal, August 29, 1986 - at pages, in its entirety and directing this Court's attention to pages 6 and 7. and page 11 (bottom) and page 12 (top).

12. E. Ground five: Petitioner seeks to challenge the trial court's abuse of discretion. In that, the trial court seen [sic] fit to allow the State to call the Jury Foreperson, a Gwyn Harvey to testify as to what other jury members thought and for what evidence did they base their decision to convict petitioner. Petitioner asserts that the Court has abused its discretion in allowing said witness to offer hearsay testimony in this cause.

PETITIONER RELIES UPON THE:

1. Trail [sic] Transcript of July 30, 1986 - at pages 305 (bottom line) and thru page 307;

2. Transcript of Appeal, August 29, 1986 - at pages 11 and 12.

Supporting **FACTS:** Petitioner asserts that our present contention and argument is; if, it was vital and/or so

important enough for the State to call the Jury-foreperson, Gwyn Harvey to defend his position? Then it was as equally important and/or essential for the petitioner to have the opportunity to defend against and/or refut[e] any testimony or evidence being offered into evidence by the State. Further, we submit that petitioner could and should have been able and/or permitted to call both the court bailiff, Mr. Enright and " the unknown juror " into court to offer testimony to resolve these facts still in doubt [] based upon a legal theory of guilt must be proven beyond a reasonable doubt)...

12. F. Ground six: Petitioner seeks to challenge the trial court's abuse of discretion. In that, the trial court seen [sic] fit to allow the State to illicit [sic] testimony of " unknown and/or alleged " of witnesses that were critical to petitioner['s] apprehension and arrest. All testimony offered into evidence of the two unknown black female witnesses goes to " hearsay " and is inadmissible. Having said admission to deny petitioner his mostabasic [sic] and fundamental right to confront his accusers.

PETITIONER RELIES UPON THE:

1. Transcript Purpose of Appeal, June 12, 1986 - at pages 4-9, 19-21, and 24;

2. Trail [sic] Transcript of July 30, 1986 - at pages 63-68, 130-134, 202-203, 205, 225-225, State's Opening

Statement, 70, State's Opening Argument, 289, 294, and 297, State's Closing Argument, 299;

3. Legal File, Motion To Suppress Identification, pages 13-14 and Motion In Limine, pages 16-17.

Supporting **FACTS:** Petitioner asserts that said out-of-court identification was the product result and " fruit of the poisonous tree " thus making petitioner's arrest unlawful. Petitioner further contends that the circumstances surrounding the said out-of-court identification were so inherently suggestive and conducive to mistaken identification as to violate due process under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 15, and 18 (a) of the Missouri Constituion [sic]. The testimony of said witnesses as to any in-court identification has been fatally infacted [sic] by the tainted out-of-court identification, and as such is merely a product of that improper out-of-court identification.

Petitioner timely filed his objections (i.e. motion in limine) to exclude any testimony the state may introduce on what two black females did or said. These two black **unidentified** females are not named in any police report and are not endorsed as state's witnesses. Any statements made by these two **unidentified** black female identifying the petitioner as the perpetrator of the present offense goes directly to the issue of identification and hence guilt of the petitioner. Moreover, it will be used solely for the truth of the

matter asserted that being the identification of petitioner as the perpetrator of the crime herein charged. Further, it is in direct violation of defendant/petitioner's constitutional rights of confrontation of this accusers. The probative value of any such testimony is clearly outweighed by its prejudicial effect on the petitioner. If the petitioner had been granted a sustained objection; at trial, this would have been insufficient protection for the petitioner. The jury would have been unable to seperate [sic] the issues; in an effective legalgistic [sic] context.

12. **G. Ground seven:** Petitioner asserts that timely objections were made at trial; that this is not a jury of the defendant[']s peers (Tr. 58). The trial court erred in overruling petitioner's objection to the state's striking veniremen or persons Number 22, Tommy Moody, and Number 24, William Hunt were two of three balck [sic] persons in the pool of venirepersons. Allowing the state to strike two of the three black venirepersons denied the petitioner a trial by a jury composed of his peers. Said error on the part of the court led to a denial of petitioner's due process rights under the Fourth, Fifth, Sixth, and Fourteenth Amendment to the United States Constitution.

PETITIONER RELIES UPON THE:

1. Trial Transcript of July 30, 1986 - at pages 10, 14-15, 23, 26-27, 30, 35, 39, 42, 58, and 61-62;

2. Legal File, Defendant's Motion For New Trial - at page 34;

3. Appeal Brief, at pages 7-9. Petitioner relies on the facts that are delineated in the body of his argument of his appeal brief.

Supporting **FACTS:** The trial court erred in overruling petitioner's objection to the State's use of peremptory challenges to strike black persons from the jury panel. This error led to a denial of petitioner's due process rights. Petitioner also challenges other questionable and/or suspect nature of several other jurors participation in his trial?

12. H. Ground eight: Petitioner asserts that the State's Prosecutor, Mr. Larner knowingly and willingly engaged in improper arguments of evidence that they reasonably should have known were erronous [sic]. Petitioner asserts that said references were a calculated strategy to mislead the jury. Knowing full well that said references were both prejudicial and inflammatory.

PETITIONER RELIES UPON THE:

1. Trial Transcript of July 30, 1986 - at pages 69, 75, 101, and 125, State's Opening Argument, page 291

Supporting **FACTS:** The in-court testimony during the State's opening Statement, where the State improperly argued highly

inflammatory and extremely prejudicial statements and/or made several comments to facts of an uncharged crime, outside the scope of pleadings and clearly not in evidence.(i.e. alleged threats to rape...).

The in-court testimony during the State's Opening Argument, where the State improperly argued highly inflammatory and extremely prejudicial statements and/or comments to facts not in evidence.(i.e. as to the number of people that allegedly saw petitioner wearing State's Exhibit 1 and 2...).

Petitioner's present contention is that there is absolutely no corrobative [sic] evidence, documentation, or testimony to support State's erroneous claims. That anybody other than the alleged vistim[sic], and two alleged unidentified black female witnesses saw petitioner wearing said same. And one and two makes three; not six. Petitioner further asserts this to be a calculated reference to facts not in evidence. And meant for the sole purpose to mislead the jurors as to the incriminating ownership of State's Exhibits 1 and 2. Petitioner asserts that without the State must have known it would have made for a much weaker case for the State. Petitioner asserts that out of all the crowd of people, on the streets and that was on the parking lot; no one saw petitioner throw the jogging suit under the car. The State has failed to produce any witnesses whatsoever that saw petitioner throw the jogging suit under the car; as state erroneously alleges.

Petitioner also asserts that " all " the Prosecuter's [sic] Opening and Closing Statements and Arguments; all references that the Prosecuter [sic] makes or made to anything petitioner may of [sic] said " before " his arrest and/or mirandized is inadmissible and improper argument(s).

12. I. Ground nine: Petitioner seeks to challenge the incompetency of trial counsel. In that counsel has failed to act in petitioner's best interest at all stages of the proceedings. Petitioner asserts that trial counsel has failed to perform the customary skills of a reasonably competent attorney would have performed under similar circumstances. That trial counsel has not represented petitioner with the degree of diligence and/or as zealously as he should have.

PETITIONER RELIES UPON THE:

1. Transcript Purpose of Appeal, June 12, 1986 - at pages 5, 11, 12, and 14;

2. Trial Transcript of July 30, 1986 - at pages 209-210, 242, 305-306, State's Opening Argument, 286-287, 291.

Supporting **FACTS:**[] Petitioner asserts that trial counsel was incompetent for these reasons:

(1) Trial Counsel failed to inspect State's Exhibit 1 and 2. Which permitted the discovery of evidence of an uncharged crime...

(2) Trial counsel failure to timely object and/or preserve for appeal; the Prosecuter's [sic] improper argument during his opening statement/argument (T. 69) that petitioner tried to rape victim...

(3) Trial counsel failed to show or establish from the in-court testimony that " no robbery " or prima facie case exist, via., in-court testimony that all victim's property was still in her purse, State's Exhibit 3. Petitioner contends that at best, trial counsel could have and should have timely request the appropriate " **lesser included offense jury instruction** " (i.e. purse-snatching)...

(4) Trial counsel failed to fully investigate petitioner's cause in a diligent and/or effective manner; in preparation of petitioner's Sentencing Hearing. That a reasonably competent attorney would have discovered who " the unknown juror " was that was so vital to petitioner's proven his cause, as it pertains to the evidence of an uncharged crime...

(5) Trial counsel failed to make numerous and timely objections and to preserve each of these

issues for appeal; of the prosecuter's [sic] improper arguments... and where prosecuter [sic] defines " **reasonable doubt.".**

(6) Petitioner without waiving any additional grounds of incompetency of trial counsel; he will leave this list incomplete, until such time this Court appoints counsel to file an amended complaint or until such time petitioner files an amended complaint...

(7) **Petitioner incorporates by reference his Challenge of his information,**
12. J. Ground ten... (next page)

12. J. Ground ten: Petitioner seeks to challenge the original information in this cause and at page -1 - of his legal file. Petitioner asserts that the information is fatally defective and does not fully set forth a prima facie case for which petitioner is and was charged.

Supporting **FACTS:** Petitioner asserts that petitioner's information is totally void of the essential elements of what constitutes " a felony " against the State of Missouri.(i.e. stealing of $150). Petitioner's Information reads as follows:: [sic]

" The Prosecuting Attorney of the County of St. Louis, State of Missouri, charges that the

defendant in violation of Section 569.030, RSMO. Committed the Class B Felony of Robbery in the Second Degree, punishable upon conviction under Section 558.011.1 (2), RSMO, inthat [sic], on or about Saturday, October 5, 1985 between 11:05 p.m. and 11:16 p.m. at 1900 Kienlen, in the City of Hillsdale, in the County of St. Louis, State of Missouri, the defendant forcibly stoleaa [sic] ladies purse, containing U.S. Currency and personal papers, owned by Colette Marie Johnson.".

All matters herein mentioned were in violation of the constitutional rights of the petitioner under the Fifth, Sixth, and Fourteenth Amendment and the due process Clause of the United States Constitution and Article I, Section 19, and Article I, Section 10 of the Missouri Constitution.

[----------
return to Petition form----------]

[15](c) At trial: SHAWN GOULET, ADDRESS UNKNOWN

(d) At sentencing: SHAWN GOULET, ADDRESS UNKNOWN

(e) On appeal: PAUL MADISON, ADDRESS UNKNOWN

(f) In any post-conviction proceeding: n/a

(g) On appeal from any adverse ruling in a post-conviction proceeding: n/a

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ___ No. X

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes X No. ___

(a) If so, give name and location of court which imposed sentence to be served in the future: UNITED STATES DISTRICT COURT, EASTERN DISTRICT

(b) Give date and length of the above sentence: DECEMBER 19, 1986, 2 YEARS

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ___ No X

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

None - pro se -

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 6, 1992

(date)

Jimmy D. Elem-

Signature of Petitioner